APAAC Seminar: Duplicitous Indictments and Duplicitous Charges

I. General principles.

1. "An indictment that charges separate or multiple crimes in the same count is duplicitous." *State v. Ramsey*, 211 Ariz. 529, 532, ¶ 6, 124 P.3d 756, 759 (App.2005). Duplicitous indictments are forbidden because "[t]he law in Arizona requires that each offense must be charged in a separate count." *State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989) (citing *State v. Axley*, 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982), and Ariz.R.Crim.P.13.3(a)).

> **N.B. "Multiplicity occurs when an indictment charges a single offense in multiple counts."** *State v. Powers*, 200 Ariz. 123, 125, ¶ 5, 23 P.3d 668, 670 (App.2001), *approved*, 200 Ariz. 363, 26 P.3d 1134 (2001). "'The principal danger in multiplicity—that the defendant will be given multiple sentences for the same offense—can be remedied at any time by merging the convictions and permitting only a single sentence.'" *Merlina v. Jejna*, 208 Ariz. 1, 4, n.4, 90 P.3d 202, 205 n.4 (App.2004) (quoting *United States v. Reed*, 639 F.2d 896, 905 n.6 (2nd Cir. 1981)).

2. "Since Arizona law requires that each separate offense be charged in a separate count, an indictment which charges more than one crime within a single count may be dismissed as duplicitous." *State v. Schroeder*, 167 Ariz. 47, 51, 804 P.2d 776, 780 (App.1990) (citing Ariz.R.Crim.P.13.3(a); *Spencer v. Coconino County Superior Court, Div. 3*, 136 Ariz. 608, 610, 667 P.2d 1323, 1325 (1983); *Baines v. Superior Court*, 142 Ariz. 145, 151, 688 P.2d 1037, 1043 (App.1984)).

3. "The purpose behind the prohibition of duplicitous indictments is the avoidance of the following dangers: (1) failure to give the defendant adequate notice of the charges against him; (2) exposure of the defendant to the possibility of double jeopardy; and (3) conviction of the defendant by less than an unanimous jury verdict." *State v. Schroeder*, 167 Ariz. 47, 51, 804 P.2d 776, 780 (App.1990). *Accord State v. Cotton*, 228 Ariz. 105, 108, ¶ 6, 263 P.3d 654, 657 (App.2011) ("Duplicitous indictments are prohibited because they fail to give adequate notice of the charge, present a hazard of a non-unanimous jury verdict, and make a precise pleading of double jeopardy impossible in the event of a later prosecution."); *State v. Barber*, 133 Ariz. 572, 576, 653 P.2d 29, 33 (App.1982) ("The rationale underlying the prohibition against duplicitous indictments is to give notice to the defendant of exactly what charges he must defend against and to avoid the consequences of the inability of the jury to indicate which way they are voting on each of the charges.").

4**. "The defect marking a duplicitous indictment is, by definition, apparent from its text," *State v. Butler*, 230 Ariz. 465, 470, ¶ 14, 286 P.3d 1074, 1079 (App.2012), and "the rules involving prohibition against duplicity are rules of pleading which go to the manner in which charges are to be joined or separated."** *State v. Schroeder*, 167 Ariz. 47, 52, 804 P.2d 776, 781 (App.1990). "Failure to properly plead is not fatal to an indictment or information, and dismissal is not required unless the defendant has actually suffered some prejudice." *Id.*

5. Because this defect is apparent on the *face* of the charging document, a defendant who fails to challenge a duplicitous indictment within 20 days of trial, pursuant to Arizona Rules of Criminal Procedure 13.5(e) and 16.1(b), could find his duplicitous-indictment claim on appeal "precluded," based on the rationale that the defendant had advance notice of the defect from the indictment's text, but deliberately elected against lodging a timely objection to deprive the State of the opportunity to "remedy any duplicity by filing a new indictment charging multiple counts [exposing him] to multiple penalties." *State v. Anderson*, 210 Ariz. 327, 335-36, ¶ 16-17, 111 P.3d 369, 377-78 (2005). *Accord State v. Hargrave*, 225 Ariz. 1, 11, ¶ 28, 234 P.3d 569, 579 (2010) ("A defendant must challenge a defect in a charging document before trial. … This requirement affords the state an opportunity to cure a defective charging document."); *Anderson*, 210 Ariz. at 336, ¶ 18, 111 P.3d at 378 ("By failing to object before the second trial, Anderson traded the risk of a non-unanimous jury for the reward of only one potential sentence on each of the challenged counts and therefore waived any objection."); *State v. Butler*, 230 Ariz. 465, 470, ¶ 16, 286 P.3d 1174, 1179 (App.2012) ("By failing to object to the indictment, the forms of verdict, or the trial court's jury instructions, a defendant demonstrates his or her 'complicity in the charge as alleged,'" and he will not be able to carry his burden of proving fundamental error because "no prejudice results from such a strategic maneuver.") (quoting *State v. Rushton*, 172 Ariz. 454, 456, 837 P.2d 1189, 1191 (App.1992)).

<u>Caveat</u>: Arizona courts, if anything, have rendered conflicting decisions about whether a defendant who fails to raise a timely objection to a duplicitous indictment is totally barred from obtaining relief on that forfeited claim on appeal, or whether he can establish prejudicial fundamental error, despite his failure to object below. *Compare State v. Anderson*, 210 Ariz. 327, 336, ¶ 18, 111 P.3d 369, 378 (2005) ("By failing to object before the second trial, Anderson traded the risk of a non-unanimous jury for the reward of only one potential sentence on each of the challenged counts and therefore waived any objection."); *with State v. Hargrave*, 225 Ariz. 1, 11, ¶ 28, 234 P.3d 569, 579 (2010) (suggesting the possibility of finding fundamental error requiring reversal by stating, "Because Hargrave failed to challenge the indictment before trial, he has waived this issue unless he can establish fundamental error," but nonetheless upholding the conviction on an armed-robbery charge that named three employees from whom property was taken, where the indictment "adequately conveyed the offense charged," and implying that the court's jury instructions and verdict forms cured any error); *with State v. Butler*, 230 Ariz. 465, 470-71, ¶¶ 15-18, 286 P.3d 1174, 1179-80 (App.2012) (noting the tension between *Hargrave* and *Anderson* over whether a duplicitous-indictment claim raised for the first time on appeal is categorically precluded or subject to fundamental-error review, but denying relief under the fundamental-error review standard because the defendant could not establish prejudice because he was complicit in the absence of remedial measures); *with State v. Paredes-Solano*, 223 Ariz. 284, 288-92 ¶¶ 8-22, 222 P.3d 900, 904-08 (App.2009) (holding that prejudicial fundamental error resulted from a duplicitous indictment that charged violations of both subsections of A.R.S. § 13-3553(A) in each sexual-exploitation-of-a-minor count because the record did not conclusively identify the specific act underlying

each guilty verdict and the defendant presented different defenses as to the multiple acts listed in the count—a combination of circumstances that created the possibility that the jury's verdicts were not unanimous).

The murky state of Arizona law on whether an untimely duplicitous-indictment claim is subject to fundamental-error review or not poses a potentially fatal danger to the State's convictions on appeal because Arizona courts have held that the absence of jury unanimity *does* constitute prejudicial fundamental error:

> We are mindful the state presented substantial evidence Paredes–Solano had committed each of the actions alleged. This, however, is not the test. "Article 2, Section 23 of the Arizona Constitution guarantees a defendant the right to a unanimous jury verdict in a criminal case. A violation of that right constitutes fundamental, [reversible] error." *Davis*, 206 Ariz. 377, ¶ 64, 79 P.3d at 77; *see State v. Woods*, 141 Ariz. 446, 456, 687 P.2d 1201, 1211 (1984) ("[W]e agree that violation of the constitutional right to a unanimous verdict would constitute fundamental error and could be raised for the first time on appeal."); *Klokic*, 219 Ariz. 241, ¶ 24, 196 P.3d at 849 (discussing *Davis*; where possibility of nonunanimous verdict existed, "in the absence of appropriate curative measures by the trial court, such an error required reversal"); *see also State v. Thompson*, 138 Ariz. 341, 346, 674 P.2d 895, 900 (App.1984) ("Since there are two separate crimes involved, it is clear that the jury's verdict was void. It would be as if the jury had convicted someone of grand theft or burglary. Of which crime did the jury convict him?") (citation omitted). [Footnote omitted.] Paredes–Solano was deprived of his right to a unanimous jury verdict on the counts of the indictment charging sexual exploitation of a minor, and the error, therefore, was both fundamental and prejudicial.

State v. Paredes-Solano, 223 Ariz. 284, 291-92 ¶ 22, 222 P.3d 900, 907-08 (App.2009).

A prosecutor confronting these risks should contemplate resorting to the remedial measures discussed below to foreclose the danger that the jury will return a guilty verdict without unanimously agreeing upon the same criminal act.

6. <u>Duplicitous charges</u>. Mistakenly equated with a "duplicitous indictment," but posing the same dangers, "[a] duplicitous charge exists 'when the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge.'" *State v. Paredes-Solano*, 223 Ariz. 284, 287, ¶ 4, 222 P.3d 900, 903 (App.2009) (quoting *State v. Klokic*, 219 Ariz. 241, 244, ¶ 12, 196 P.3d 844, 847 (App.2008)). *Accord State v. Broman*, 228 Ariz. 302, 303 n.2, 265 P.3d 1101, 1102 (App.2011) (same).

7. "This difference may seem merely technical, because both types of duplicity error present similar problems with respect to jury unanimity and pleading double jeopardy. … But the different duplicity errors are not identical with respect to providing notice to a defendant." *State v. Butler*, 230 Ariz. 465, 470, ¶ 13, 286 P.3d 1174, 1179 (App.2012) (citing

State v. Klokic, 219 Ariz. 241, 244, ¶ 12, 196 P.3d 844, 847 (App.2008)). "The defect marking a duplicitous indictment is, by definition, apparent from its text, meaning it might not deprive a defendant of the 'fundamental right to reasonable notice of the criminal acts charged against him,' [citation omitted] in the same manner as a duplicitous charge." *Id.* at 470, ¶ 14, 286 P.3d at 1179 (quoting *Spencer v. Coconino County Superior Court, Div. 3*, 136 Ariz. 608, 610, 667 P.2d 1323, 1325 (1983)).

8. Another practical significance of this distinction: whereas Arizona defendants must challenge a duplicitous indictment within 20 days before trial to avoid forfeiture or preclusion of that claim on appeal, "[a] duplicitous charge … may be timely objected to when the presentation of evidence first creates the problem." *State v. Butler*, 230 Ariz. 465, 470, n.4, 286 P.3d 1074, 1079 n.4 (App.2009). This is because "the asserted error goes not to the indictment on its face, but to the evidence presented to prove that count of the indictment, [and the defendant] had no basis to object before the evidence was presented." *State v. Klokic*, 219 Ariz. 241, 244, ¶ 13, 196 P.3d 844, 847 (App.2008). *Accord State v. Anderson*, 210 Ariz. 327, 336, ¶ 16 n.3, 111 P.3d 369, 378 n.3 (2005) ("When the basis for a duplicity objection is not learned until trial, a prompt objection at that time is timely.")

9. In spite of the differences between duplicitous indictments and duplicitous charges, courts have held that *both* problems may be remedied with the following countermeasures during trial:

> **(a) The court may instruct the jury to unanimously agree on the specific act constituting the basis for its guilty verdict and/or submit special verdict forms or interrogatories that afford the jurors an opportunity to memorialize their findings as to each and every act the defendant committed.** *See State v. Anderson*, 210 Ariz. 327, 336, ¶ 18 n.5, 111 P.3d 369, 377 n.5 (2005) ("A duplicitous indictment also can be remedied by a jury instruction 'particularizing the distinct offense charged in each count of the indictment.'") (quoting *State v. Axley*, 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982)); *State v. Butler*, 230 Ariz. 465, 470, n.4, 286 P.3d 1074, 1079 n.4 (App.2012) ("A court may then cure the error through a special verdict form or jury instruction."); *State v. Paredes-Solano*, 223 Ariz. 284, 290, ¶ 17, 222 P.3d 900, 906 (App.2009) ("However, the error potentially resulting from such an indictment may be cured when the basis for the jury's verdict is clear, … or when the trial court instructs the jury that it must agree unanimously on the specific act constituting the crime."); *State v. Klokic*, 219 Ariz. 241, 244, ¶ 14, 196 P.3d 844, 847 (App.2008) (collecting cases holding that the court may cure a duplicitous charge by "instruct[ing] the jury that they must agree unanimously on a specific act that constitutes the crime before the defendant can be found guilty").
>
> **(b) The court may require the prosecution to elect which act constitutes the basis for the charged offense.** *See State v. Paredes-Solano*, 223 Ariz. 284, 290, ¶ 17, 222 P.3d 900, 906 (App.2009) ("However, the error potentially resulting from such an indictment may be cured when … when the state elects for the jury which act constitutes the crime[.]"); *State v. Klokic*, 219 Ariz. 241, 244, ¶ 14, 196 P.3d 844, 847

(App.2008) (collecting cases holding that the court may cure a duplicitous charge by requiring "the state to elect the act which it alleges constitutes the crime"); *State v. Schroeder*, 167 Ariz. 47, 53, 804 P.2d 776, 782 (App.1990) ("California, in fact, has adopted a rule whereby the evil of duplicitous indictments is averted by either requiring the prosecution to elect which act it relies upon for conviction or by the court's instructing the jury that it must unanimously agree that the defendant committed the same specific criminal act.").

(c) The State identified which specific act is the basis for the charged offense during opening statement and/or closing argument. *See United States v. Miller*, 520 F.3d 504, 513-14 (5th Cir. 2008) (prosecution's closing remarks cured allegedly duplicitous tax-evasion charge by identifying the specific transaction underlying the indicted offense); *State v. Hamilton*, 177 Ariz. 403, 410, 868 P.2d 986, 993 (App.1993) ("The victims testified as to the specific occurrence that formed the basis for each specific count, and the state clearly delineated during closing arguments what specific conduct constituted the offense charged in each specific count."); *State v. Molen*, 231 P.3d 1047 (Idaho App. 2010) (rejecting challenge to absence of a special unanimity instruction in a case where the defendant was charged with one act of genital-to-genital contact with a child, but evidence of more than one act was presented, because the prosecutor elected the charged incident during opening statement and closing arguments, as well as the State's trial evidence); *State v. Fulton*, 23 P.3d 167, 173 (Kan.App.2001) (prosecutor effectively elected which act constituted basis for aggravated assault charge by identifying the cutting of the victim's face and chest instead of blows inflicted during pistol-whipping); *State v. Thompson*, 290 P.3d 996, 1017-18, ¶¶ 89-90 (Wash.App.2012) (holding that the prosecutor elected during closing argument which act constituted the basis for sexual-motivation allegation underlying burglary, unlawful imprisonment, and assault charges). *Cf. Paredes–Solano*, 223 Ariz. at 291, ¶ 19, 222 P.3d at 907 (holding error caused by duplicitous indictment "was exacerbated during jury instructions and the state's closing argument").

10. These curative measures are *not* automatically necessitated by the presentation of trial evidence showing that the defendant committed multiple criminal acts. *See State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989) ("The fact that one of the elements of the crime alleged is a separately indictable offense does not render the indictment duplicitous. In this respect, the indictment is no different than an indictment under the felony-murder statute.") (quoting *Baines v. Superior Court*, 142 Ariz. 145, 151, 688 P.2d 1037, 1043 (App.1984)); *State v. Via*, 146 Ariz. 108, 116, 704 P.2d 238, 246 (1985) ("Where numerous transactions are merely parts of a larger scheme, a single count encompassing the entire scheme is proper."); *State v. Klokic*, 219 Ariz. 241, 244, ¶ 15, 196 P.3d 844, 847 (App.2008) ("[I]t is not error for the trial court to fail to require such curative measures in those instances in which all the separate acts that the State intends to introduce into evidence are part of a single criminal transaction.") (citing *State v. Counterman*, 8 Ariz.App. 526, 531-32, 448 P.2d 96, 101-02 (1968)); *State v. Solano*, 187 Ariz. 512, 520, 930 P.2d 1315, 1323 (App.1996) ("However, this rule does not apply 'where a series of acts form part and parcel of one and the same transaction, and as a whole constitute but

one and the same offense.'") (quoting *State v. Counterman*, 8 Ariz.App. 526, 531, 448 P.2d 96, 101 (1968)).

> **A. For instance, no duplicity issue exists when an element of the charged offense requires proof that the defendant engaged in conduct violating a *different* statute.** *See State v. Ramsey*, 211 Ariz. 529, 534, ¶¶ 11-12, 124 P.3d 756, 761 (App.2005) (every sexual act constituted proof of a single count of continuous sexual abuse of a child in violation of A.R.S. § 13-1417); *Baines v. Superior Court*, 142 Ariz. 145, 151, 688 P.2d 1037, 1043 (App.1984) (Here, it is clear that these petitioners have been charged with only one crime, i.e., illegally conducting an enterprise. The fact that one of the elements of the crime alleged is a separately indictable offense does not render the indictment duplicitous. In this respect, the indictment is no different than an indictment under the felony-murder statute.").
>
> **B. Under the California rule adopted in *Counterman* and reaffirmed in subsequent Arizona cases, no duplicity problem typically arises when the trial evidence shows that the defendant committed the multiple criminal acts during "a continuing scheme or course of conduct [which] may properly be alleged in a single count."** *State v. Ramsey*, 211 Ariz. 529, 534, ¶¶ 11-12, 124 P.3d 756, 761 (App.2005). *Accord State v. Hargrave*, 225 Ariz. 1, 11, ¶ 29, 234 P.3d 569, 579 (2010) ("A single count is permissible, however, if several transactions are merely parts of a larger scheme.") (internal citations omitted); *State v. Davis*, 206 Ariz. 377, 390, ¶ 65, 79 P.3d 64, 77 (2003) (implicitly endorsing *Counterman's* rejection of a duplicitous-charge claim on the ground that "the series of events formed a single transaction"); *State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989) (rejecting duplicity challenge to single aggravated-assault charge predicated upon defendant's simultaneous act of pursuing two victims with his truck); *State v. Via*, 146 Ariz. 108, 704 P.2d 238 (1985) (evidence that defendant's use of murder victim's two stolen credit cards victimized different merchants did not render charges duplicitous because the theft counts pertained to the two banks that issued the credit cards at issue); *State v. Encinas*, 132 Ariz. 493, 496-97, 647 P.2d 624, 627-28 (1982) ("[W]here two assaults occurred as part of a continuous course of conduct during the same episode giving rise to one charge of assault with a deadly weapon, the right to a unanimous jury verdict did not require the state to elect which assault it would rely on to support a conviction[.]"); *State v. Solano*, 187 Ariz. 512, 520, 930 P.2d 1315, 1323 (App.1996) ("In *Counterman*, this court held that evidence of two shootings by the defendant at the same victim constituted a single incident and did not require the state to elect which assault the defendant committed. ... Solano's separate encounters with U.M. and N.M. before and after the chase, like the separate shootings in *Counterman*, constituted single assaults against each victim."); *State v. Counterman*, 8 Ariz.App. 526, 531, 448 P.2d 96, 101 (1968) ("Both of the matters relied upon as being separate and distinct offenses, occurred in the course of a continuous effort on the part of the officer to disarm the

appellant. They were part of the same incident, and they cannot reasonably be held to constitute two separate offenses, each complete in itself, and each of which would require a separate charge and a separate trial.") (quoting *People v. Jefferson*, 266 P.2d 564, 565 (Cal.App.1954)). *Cf. State v. Schroeder*, 167 Ariz. 47, 52 n.2, 804 P.2d 776, 781 n.2 (App.1990) (finding no prejudice from an indictment charging only one count of sexual misconduct with a minor and the presentation of evidence of seven separate acts of sexual abuse occurring during a 1-2 hour span on the same evening).

N.B. Significantly, "multiple acts may be considered part of the same criminal transaction 'when the defendant offers essentially the same defense to each of the acts and there is no reasonable basis for the jury to distinguish between them.'" *State v. Klokic*, 219 Ariz. 241, 245, ¶ 18, 196 P.3d 844, 848 (App.2008) (quoting *People v. Stankewitz*, 793 P.2d 23, 41 (Cal.1990)). **Thus, the *Counterman*/California rule will not cure the duplicity issue, however, when the defendant raises a different defense to each discrete act offered in evidence.** *Compare State v. Davis*, 206 Ariz. 377, 389, ¶ 58,79 P.3d 64, 76 (2003) (evidence of two acts of sexual intercourse occurring 11 days apart constituted a duplicitous charge because "unlike the defendant in *Schroeder*, Davis offered more than one defense," an alibi defense to one and a denial as to the other); *and State v. Paredes-Solano*, 223 Ariz. 284, 291, ¶ 20, 222 P.3d 900, 907 (App.2009) ("Moreover, during trial, Paredes–Solano presented multiple defenses to the various acts with which he was charged."); *State v. Klokic*, 219 Ariz. 241, 248, ¶ 32, 196 P.3d 844, 851 (App.2008) ("This reasoning makes clear that, even when both events occur as part of a larger criminal episode, acts may not be considered part of the same criminal transaction if the defendant offers different defenses to each act or there is otherwise a reasonable basis for distinguishing between them.").

11. Nonetheless, "[a] count is not considered duplicitous merely because it charges alternate ways of violating the same statute." *State v. O'Brien*, 123 Ariz. 578, 583, 601 P.2d 341, 346 (App.1979) (quoting *State v. Parmenter*, 444 P.2d 680 (Wash.1968)). *See also Schad v. Arizona*, 501 U.S. 624, 631 (1991) ("We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission any more than the indictments were required to specify one alone."); *United States v. Crisci*, 288 F.3d 235, 238-39 (2nd Cir. 2001) ("However, an indictment is not defective if it alleges 'in a single count ... the commission of a crime by several means.'") (quoting *United States v. Murray*, 618 F.2d 892, 896 (2nd Cir. 1980)); *United States v. Fulbright*, 102 F.3d 443, 449 (9th Cir. 1997) ("Where a statute enumerates several means of committing an offense, an indictment may contain several allegations in the conjunctive."); *State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990) (holding that an instruction that tracks the statutory language of "dangerousness" statute in defining alternate ways for a finding of dangerousness is not duplicitous); *State v. Snodgrass*, 117 Ariz. 107, 112, 570 P.2d 1280, 1285 (App.1977) (information charging the accused with obstruction of justice was not duplicitous merely because it alleged in the disjunctive three alternative courses of conduct by which the accused could have committed the charged offense).

N.B. When a criminal statute enumerates the various ways a defendant may commit the offense, there is no constitutional requirement that the jury unanimously agree upon means by which the defendant perpetrated the crime. *See State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993) (collecting cases and holding that unanimity not required for the manner in which the defendant violated the kidnapping statute, A.R.S. § 13-1304); *State v. Encinas*, 132 Ariz. 493, 496-97, 647 P.2d 624, 627-28 (1982) ("Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.") (noting that A.R.S. § 13-1105 sets forth two different ways of committing first-degree murder—with premeditation or during the course and in furtherance of a predicate felony); *State v. Cotten*, 228 Ariz. 105, 107-8, ¶¶ 3-6, 263 P.3d 654, 656-57 (App.2011) (because A.R.S. § 13-1802 established theft as a single, unified offense, the indictment was not rendered duplicitous by the court's refusal to give special verdict forms requiring the jury to agree unanimously on whether the defendant stole the guns or instead possessed them knowing that they were stolen). **"However, each of these statutes focuses on a single harm to the victim—death, restraint without consent, or deprivation of control over one's property—and the subsections merely provide different ways of causing that single harm."** *State v. Paredes-Solano*, 223 Ariz. 284, 290, ¶ 14, 222 P.3d 900, 906 (App.2009).

12. An appellate court will uphold a conviction against a duplicity challenge if the defendant suffered no actual prejudice. *See e.g., State v. Petrak*, 198 Ariz. 260, 268, ¶ 28, 8 P.3d 1174, 1182 (App. 2000) ("Additionally, if the defendant suffers no prejudice from the duplicitous indictment, we need not reverse the conviction."). Courts will not find prejudice in two circumstances:

(A) The State has presented overwhelming evidence that the defendant committed all of the criminal acts offered to prove guilt on the single charged offense. *See State v. Kelly*, 149 Ariz. 115, 117, 716 P.2d 1052, 1054 (App. 1986) ("To constitute reversible error, the defendant must have been prejudiced by it when considered in conjunction with all the evidence in the case. In this case, since the whole incident was recorded on tape and since the defendant, the victim, and two witnesses all agree that the defendant did point a rifle at the victim and did cause serious physical harm to the victim with a knife, it is hard to see any prejudice [from an indictment charging the defendant with only one count of aggravated assault].").

(B) The defendant has presented the same defense to each of the multiple acts constituting the potential basis for a guilty verdict. *See State v. Klokic*, 219 Ariz. 241, 247, ¶ 26, 196 P.3d 844, 850 (App.2008) ("[A]ny error in not taking curative measures to insure unanimity would not have been prejudicial because the defendant presented the same defense to each of the sexual acts."); *State v. Schroeder*, 167 Ariz. 47, 52-53, 804 P.2d 776, 781-82 (App.1990) (although the prosecution presented evidence that the defendant had fondled the

victim on multiple occasions to prove a single count of child molestation, the defendant suffered no prejudice because the defendant denied any sexual abuse, and the sole issue before the jury was which witness was more credible).

II. Duplicity problems in sex crime cases.

1. Duplicitous charges and indictments arise in sex-crime cases because Arizona courts have issued numerous opinions holding that a defendant may be charged with and sentenced for each sexual violation of his victim, even if all of these crimes were committed against the same person, in rapid-fire succession during the same incident, and at one location. *See State v. Griffin*, 148 Ariz. 82, 86, 713 P.2d 283, 287 (1986) (rejecting double-jeopardy challenge to consecutive sentences for four different sexual assaults, where "[e]ach felonious act was performed independent of the others and was completed prior to the beginning of the next act," and finding it "irrelevant that the acts were committed within a relatively short time span"); *State v. Hill*, 104 Ariz. 238, 240, 450 P.2d 696, 698 (1969) ("When several acts of intercourse and several lewd and lascivious acts are committed on the same victim we see no reason why as many counts for each offense cannot be brought, despite the fact the defendant never left his victim's bed during the course of the commission of the acts."); *State v. Williams*, 182 Ariz. 548, 562–64, 898 P.2d 497, 511–13 (App.1995) (upholding imposition of consecutive sentences for multiple acts of fellatio and intercourse occurring in rapid succession during the same rape episode) (collecting cases); *State v. Boldrey*, 176 Ariz. 378, 381, 861 P.2d 663, 666 (App.1993) ("Multiple sexual acts that occur during the same sexual attack may be treated as separate crimes."); *State v. McCuin*, 167 Ariz. 447, 449, 808 P.2d 332, 334 (App.1991) ("When several sexual acts result from the same sexual attack, the defendant may be charged with more than one crime."); *State v. Stuck*, 154 Ariz. 16, 22, 739 P.2d 1333, 1339 (App.1987) (upholding consecutive sentences for separate and distinct sexual assaults committed on the same day).

2. This problem is exacerbated by the fact that victims often surprise prosecutors and defense attorneys alike by testifying about uncharged acts that they did not disclose during pretrial interviews or debriefings, but recalled during the course of recounting the charged offense(s) at trial. *See State v. Marshall*, 197 Ariz. 496, 500, ¶¶ 8-12, 4 P.3d 1039, 1043 (App.2000).

3. Because duplicity challenges arise from evidence showing that the defendant committed the same type of conduct on multiple occasions, we should determine the "unit of prosecution" for the charged offense—an inquiry that will help us identify whether the multiple acts combine to form one offense or multiple offenses. *See Sanabria v. United States*, 437 U.S. 54, 69-70 (1978) ("Whether a particular course of conduct involves one or more distinct 'offenses' under the statute depends on [the legislature's] choice [in defining the "allowable unit of prosecution"].") (collecting cases).

4. A.R.S. § 13-1417 is "a continuing course of conduct statute." Consequently, the State may offer evidence that the defendant charged with continuing sexual abuse of a minor engaged in sexual assault, molestation, or sexual intercourse with the same victim on three or more occasions during at least a 3-month period before the victim's fourteenth

birthday without violating the duplicity prohibition, because "the *actus reus* of § 13-1417 is the pattern of sexual assaults—the continuous course of conduct—rather than each individual act." *State v. Ramsey*, 211 Ariz. 529, 538, ¶ 28, 124 P.3d 756, 765 (App.2005).

5. For violations of A.R.S. § 13-3553, the unit of prosecution is *each* visual depiction of child pornography, even when the visual depictions are found on the same computer media or constitute duplicate copies of the same image or movie file:

> Section 13–3553(A)(2) prohibits "possessing ... any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct." A "'[v]isual depiction' includes each visual image that is contained in an undeveloped film, videotape or photograph or data stored in any form and that is capable of conversion into a visual image." A.R.S. § 13–3551(11). **As our supreme court noted in *State v. Berger*, the legislature intended these statutes to criminalize each image that constitutes child pornography because its very existence harms the victim it depicts**. 212 Ariz. 473, ¶¶ 3, 18–20, 134 P.3d 378, 379, 382–83 (2006) (*Berger II*). **Even identical images, therefore, result in separate prosecution and punishment.** *State v. Valdez*, 182 Ariz. 165, 170–71, 894 P.2d 708, 713–14 (App.1994); see A.R.S. §§ 13–705(M), 13–3553(C) (requiring consecutive sentences for each conviction of sexual exploitation of minor under fifteen); see also A.R.S. § 13–711(A) ("Except as otherwise provided by law, if multiple sentences of imprisonment are imposed on a person at the same time, the sentence or sentences imposed by the court shall run consecutively....").
>
> Other jurisdictions have held that multiple convictions for possession of child pornography do not constitute double jeopardy, even if the separate images underlying the convictions were obtained in the same electronic download, *see, e.g., Fink v. State*, 817 A.2d 781, 787–88 (Del.2003), or contained in the same compact disk, *see, e.g., State v. Ravell*, 155 N.H. 280, 922 A.2d 685, 687 (2007). **Under Arizona law, we similarly must conclude that separate convictions and punishments for different images on the same DVD are constitutionally permissible because the legislature intended the unit of prosecution to be each individual "depiction**." § 13–3553(A)(2).

State v. McPherson, 228 Ariz. 557, 560, ¶¶ 6-7, 269 P.3d 1181, 1184 (App.2012) (emphasis added). *Accord State v. Jensen*, 217 Ariz. 345, 348, ¶ 6 nn.4 & 5, 173 P.3d 1046, 1049 nn.4 & 5 (App.2008) (noting that each "visual depiction" of child pornography is a separate violation of A.R.S. § 13–3553(A)(2)). By coupling "any" with the singular nouns "visual depiction" and "a minor" in A.R.S. § 13-3553(A), the Legislature signaled its intention to render each discrete visual depiction the basis of a separate criminal charge, as manifested by extra-jurisdictional precedent reaching this result while construing similarly phrased statutes. *See Fink v. State*, 817 A.2d 781, 788 (Del.2003); *Pontius v. State*, 930 N.E.2d 1212, 1215-18 (Ind.App.2010); *Brown v. State*, 912 N.E.2d 881, 895 (Ind.App.2009); *Williams v. Commonwealth*, 178 S.W.3d 491, 495 (Ky.2005); *State v. Mather*, 646 N.W.2d 605, 610-11 (Neb.2002); *State v. Cobb*, 732 A.2d 425,

433-34 (N.H.1999); *State v. Stratton*, 567 A.2d 986, 989 (N.H.1989); *State v. Howell*, 609 S.E.2d 417, 420–21 (N.C.App.2005); *Commonwealth v. Davidson*, 938 A.2d 198, 219 (Pa.2007); *Vineyard v. State*, 958 S.W.2d 834, 837 (Tex.Crim.App.1998); *State v. Morrison*, 31 P.3d 547, 555-56, ¶¶ 24-26 (Utah 2001); *State v. Schaefer*, 668 N.W.2d 760, 778 (Wis.App.2003); *State v. Hamilton*, 432 N.W.2d 108, 114 (Wis.App.1988); *Educational Books, Inc. v. Commonwealth*, 323 S.E.2d 84, 86 (Va.1984).

6. Regardless of the unit of prosecution prescribed by hands-on offenses, such as sexual conduct with a minor (A.R.S. § 13-1405(A)), molestation of a child (A.R.S. § 13-1410(A), and incest (A.R.S. 13-3608), Arizona courts have found sexual acts occurring on *different days* to give rise to separate counts. *See State v. Davis*, 206 Ariz. 377, 389-91, ¶¶ 54-66, 79 P.3d 64, 76-78 (2003) (solitary charge of sexual conduct with a minor was duplicitous because it was predicated upon two acts of intercourse with same underage girl occurred 11 days apart) (citing *Hash v. State*, 48 Ariz. 43, 50, 59 P.2d 305, 308 (1936)); *Spencer v. Coconino County Superior Court*, 136 Ariz. 608, 610, 667 P.2d 1323, 1325 (1983) (finding duplicitous an indictment charging the defendant with one count of incest and one count of child molestation, where the facts giving rise to these charges involved over 100 separate incidents occurring over 13 months); *State v. Garcia*, 200 Ariz. 471, 472, ¶ 1, 28 P.3d 327, 328 (App.2001) (noting the imposition of consecutive 17-year prison terms as the sentences originally imposed against the defendant for molesting the same child on two different occasions); *State v. Marshall*, 197 Ariz. 496, 504, ¶ 30, 4 P.3d 1039, 1047 (App. 2000) (rejecting argument that court should vacate two of defendant's three convictions for child molestation as being based on the same continuous act, where the videotape depicted the victim masturbating herself at defendant's direction on three different occasions between October 4th through October 8th). *Cf. State v. Hamilton*, 177 Ariz. 403, 410, 868 P.2d 986, 993 (App.1993) (rejecting a duplicitous-indictment claim where "the challenged counts charged defendant with the commission of one specific act against one specific victim within a specific time period").

7. "Sexual intercourse" is defined by statute as "penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva." A.R.S. § 13–1401(3). This statutory text indicates that **each penetration** constitutes the basis for a separate charge. *See State v. Hill*, 104 Ariz. 238, 240, 450 P.2d 696, 698 (1969) ("When several acts of intercourse and several lewd and lascivious acts are committed on the same victim we see no reason why as many counts for each offense cannot be brought, despite the fact the defendant never left his victim's bed during the course of the commission of the acts."); *State v. Williams*, 182 Ariz. 548, 562–64, 898 P.2d 497, 511–13 (App.1995) (upholding imposition of consecutive sentences for multiple acts of fellatio and intercourse occurring in rapid succession during the same rape episode) (collecting cases); *State v. McCuin*, 167 Ariz. 447, 449, 808 P.2d 332, 334 (App.1991) ("Here, the evidence offered by the state sufficiently established the separate acts of defendant's placing his finger in the victim's vagina and placing his penis in the victim's vagina. Each act constituted intercourse as defined by A.R.S. § 13–1401 and each was established without reference to the elements of the other. When several sexual acts result from the same sexual attack, the defendant may be charged with more than one crime."), *aff'd in part and vacated in part on different grounds*, 171 Ariz. 171, 829 P.2d 1217 (1992); *State v. Stuck*, 154 Ariz. 16, 22, 739 P.2d 1333, 1339 (App.1987) (upholding consecutive

sentences for separate and distinct sexual assaults committed on the same day); *State v. Bruni*, 129 Ariz. 312, 315, 630 P.2d 1044, 1047 (App.1981) (upholding separate counts per act of sexual intercourse with each rape victim).

8. The statutory definitions of "oral sexual contact" and "sexual contact" indicate that a separate charge may be based upon physical contact with each body part of the defendant and the victim. *See* A.R.S. § 13-1401.1 ("'Oral sexual contact' means oral contact with the penis, vulva, or anus."); A.R.S. § 13-1401.2 ("'Sexual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact." Thus, a defendant may be charged with four counts of child molestation if he engaged in the following acts during the same incident: (a) he touched the genitals of the victim; (b) he touched the victim's anus; (c) he made the victim touch his penis; and (d) he made the victim touch his anus. Likewise, the defendant could be prosecuted for four counts of sexual assault or sexual conduct with a minor if he and the victim had oral sexual contact with each other's genitals and anus during the same episode.

9. The much more difficult question arises when the defendant and the victim have sexual contact with each other when the petting is separated by mere moments and occurs during the same episode of sexual activity not interrupted by an intervening event (i.e., an unexpected visitor's arrival, a meal, a television show, an errand, or the departure of either person). Arizona has no authority precisely on point, particularly in the child-molestation and sexual-abuse contexts.

> **Recommendation: Charge each and every distinct act of sexual contact or penetration that the victim recalls as a separate count**. If the court finds these charges multiplicitous because they allege the same offense in two counts, the remedy is tolerable: one of the two resulting convictions and sentences will be vacated, but the other count's verdict and sentence will be affirmed. In contrast, charging two or more offenses in the same count—a duplicitous indictment—will result in reversal of the one and only conviction and mandate retrial. Multiplicity is the lesser of the two evils.

10. Also note that the sexual-exploitation statute recently produced a decision that held that an indictment that alleged acts listed in both subsections of A.R.S. § 13-3553(A) was duplicitous because subsections (A) and (B) defined two different crimes:

> As noted above, a duplicitous indictment charges two or more separate offenses within a single count. In this case, both counts of sexual exploitation in the indictment alleged acts that violated two different subsections of § 13–3553(A). "[T]here is a class of criminal statutes that defines a specific crime and provides ways in which the crime may be committed, and another class that may set forth several distinctive acts and make the commission of each a separate crime, all in one statute." *State v. Dixon*, 127 Ariz. 554, 561, 622 P.2d 501, 508 (App.1980). It is thus our task to interpret the language of this statute and determine in which class the

legislature intended § 13–3553 to fall. *See State v. Fell*, 209 Ariz. 77, ¶ 33, 97 P.3d 902, 911 (App.2004).

We begin with the language of the statute. Section 13–3553 provides, in pertinent part:

> A. A person commits sexual exploitation of a minor by knowingly:
>
> 1. Recording, filming, photographing, developing or duplicating any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.
>
> 2. Distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.

These two subsections identify a variety of discrete actions involving visual images of minors engaged in "exploitive exhibition or other sexual conduct." The text reveals a difference in the types of actions listed in the two subsections: the acts listed in subsection (A)(1) are directed at the creation of a visual image whereas those in subsection (A)(2) can only occur after an image has been created. Thus, the statute addresses two separate harms—the creation of visual images and their subsequent distribution and viewing. This suggests a legislative intention to create two separate offenses, each encompassing a distinct phase of the child pornography production and distribution process. *See State v. Taylor*, 160 Ariz. 415, 420, 773 P.2d 974, 979 (1989) ("The legislature has provided for separate punishment for sexual exploitation of a minor by photographing the minor, A.R.S. § 13–3553(A)(1), and sexual exploitation of a minor by possessing a photograph of the minor[,] A.R.S. § 13–3553(A)(2).").

Many courts, including both the United States and Arizona Supreme Courts, have recognized these harms as distinct, separable injuries to the child victim. In *New York v. Ferber*, the Supreme Court acknowledged:

> "[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography."

458 U.S. 747, 759 n.10 [ ] quoting DAVID P. SHOUVLIN, PREVENTING THE SEXUAL EXPLOITATION OF CHILDREN: A MODEL ACT, 17 WAKE FOREST L.REV. 535, 545 (1981). *See also, e.g., Osborne v. Ohio*, 495 U.S. 103, 111 [ ] (1990) ("[T]he materials produced by child pornographers permanently record the victim's abuse.

The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come."); *United States v. Norris*, 159 F.3d 926, 929–30 (5th Cir. 1998) ("Unfortunately, the 'victimization' of the children involved does not end when the pornographer's camera is put away. The consumer ... of pornographic materials may be considered to be causing the children depicted in those materials to suffer as a result of his actions in at least three ways"—perpetuation of original abuse, invasion of children's privacy, and instigation of original production of such materials by supplying economic incentive.); *State v. Berger*, 212 Ariz. 473, ¶ 18, 134 P.3d 378, 382 (2006) (child pornography victims harmed not only by production of images but also by invasion of privacy in others' continued possession of such images).

Our interpretation is confirmed by the legislature's stated purposes in enacting what is now § 13–3553. *See* 1978 Ariz. Sess. Laws, ch.200, §§ 2, 3. Its findings included:

> The use of children as subjects in the production of pornographic materials is very harmful to both children and society as a whole.
>
> ...
>
> Pornographic materials depicting children as participants are frequently utilized to lure other children into sexual conduct resulting in the further sexual exploitation of children.
>
> [D]istribution of child pornography is harmful to the children of this state in that such distribution is a continuing cause of harm to the child participants and that it further develops the climate encouraging the sexual exploitation of other children.

Id. § 2. Consequently, the legislature stated:

> The public policy of this state and the general purposes of the provisions of this act relating to sexual exploitation of children are:
>
> 1. To protect all children of this state from being sexually exploited.
>
> 2. To prohibit any conduct which causes or threatens psychological, emotional, or physical harm to children as a result of such sexual exploitation.
>
> ....
>
> 4. To impose just and deserved punishment on those who sexually exploit children.

Id.

Thus, our legislature has recognized the various ways in which victims are harmed by the production and proliferation of child pornography and has stated its intention to "impose just and deserved punishment on those who sexually exploit children." Notably, in other areas involving crimes against children, the legislature similarly has sought to "impose separate and severe punishment for each and every dangerous crime against children," recognizing "each factually distinct act ... expose[s the child] to a separate harm." *See State v. Boldrey*, 176 Ariz. 378, 381, 861 P.2d 663, 666 (App.1993) (holding constitutional mandatory consecutive sentences for multiple criminal acts occurring during single "sexual episode" with minor); *see also* § 13–705(P)(1)(g).

In its answering brief the state contended FN5 the statute defining sexual exploitation of a minor is like the statutes defining first-degree murder, kidnapping, and theft, A.R.S. §§ 13–1105 (first-degree murder), 13–1304 (kidnapping), 13–1802 (theft),FN6 all of which the courts of this state have held describe a single offense despite providing in multiple subsections different ways to commit the offense. *See State v. Herrera*, 174 Ariz. 387, 394, 850 P.2d 100, 107 (1993) (kidnapping); *State v. Encinas*, 132 Ariz. 493, 496–97, 647 P.2d 624, 627–28 (1982) (first-degree murder); *Dixon*, 127 Ariz. at 561, 622 P.2d at 508 (theft). However, each of these statutes focuses on a single harm to the victim—death, restraint without consent, or deprivation of control over one's property—and the subsections merely provide different ways of causing that single harm.

> FN5. At oral argument, the state conceded § 13–3553 contains multiple offenses and the indictment in this case was duplicitous. However, because this appears to be a question of first impression and involves the interpretation of a statute, we nonetheless address the issue in full.

> FN6. The state also cites the aggravated assault statute, A.R.S. § 13–1204(A), as another example of a statute listing various ways of committing an offense but not defining multiple offenses. However, although one division of this court has so concluded, *see State v. Pena*, 209 Ariz. 503, ¶ 12, 104 P.3d 873, 876 (App.2005), it did so without referring to a prior case that held charging multiple subsections of § 13–1204(A) within a single count rendered the indictment duplicitous, *see State v. Kelly*, 149 Ariz. 115, 116–17, 716 P.2d 1052, 1053–54 (App.1986). *Cf. In re Jeremiah T.*, 212 Ariz. 30, ¶ 12, 126 P.3d 177, 181 (App.2006) (Sixth Amendment notice issue in case charging simple assault; "subsections of 12–1203(A) are not simply variants of a single, unified offense; they are different crimes"); *State v. Sanders*, 205 Ariz. 208, ¶ 33, 68 P.3d 434, 442 (App.2003) (same).

In contrast, the statute defining sexual exploitation of a minor lists a number of distinct acts, grouped together in separate subsections by the type of

> **harm they cause. The actions listed in subsection (A)(1) cause harm to the child in the creation of the visual images, while the acts in subsection (A)(2) harm the child through the perpetuation of those images. Each subsection is violated by distinctly different conduct causing different kinds of harm to the child. The two subsections thus represent more than merely different ways of committing a single offense and, we conclude, create offenses that are separate and distinct.**
>
> Here, counts one and two of the indictment allege six separate criminal acts drawn from the two subsections in § 13–3553(A). **At trial, the state produced evidence of four acts: photographing, developing, transporting, and possessing images. Photographing and developing are violations of § 13–3553(A)(1); transporting and possessing are violations of subsection (A)(2). Thus, the indictment alleged multiple offenses within a single count and was duplicitous on its face.**

State v. Paredes-Solano, 223 Ariz. 284, 288-90 ¶¶ 9-16, 222 P.3d 900, 904-06 (App.2009) (emphasis added).

A reasonable construction of this opinion is that: (1) subsections A and B define two separate crimes—the first addressing the production or creation of child pornography, such as by photographing, and the latter targeting the distribution and consumption of these contraband images—with the consequence that a single count alleging acts listed in *both* subsections is facially duplicitous; BUT (2) the various acts listed within each subsection merely constitute different means of committing the same offense, and juror unanimity is not required on which particular act the defendant committed (as in *Schad, Encinas, Herrera, Cotton,* and *Dixon*).

I have reservations about this construction and advise the prosecution to charge each act within subsections A and B separately because of the following passage from *Paredes-Solano,* which holds that the defendant suffered prejudice from the duplicitous indictment because he presented different defenses to "photographing" and "developing," both of which are acts prohibited by A.R.S. § 13-3553(A)(1):

> Here, counts one and two of the indictment allege six separate criminal acts drawn from the two subsections in § 13–3553(A). At trial, the state produced evidence of four acts: photographing, developing, transporting, and possessing images. Photographing and developing are violations of § 13–3553(A)(1); transporting and possessing are violations of subsection (A)(2). Thus, the indictment alleged multiple offenses within a single count and was duplicitous on its face.
>
> That an indictment is duplicitous does not, by itself, require reversal; a defendant must prove actual prejudice. *State v. Hamilton*, 177 Ariz. 403, 410, 868 P.2d 986, 993 (App.1993). Paredes–Solano contends that, because he presented different defenses to the acts alleged and the trial court took no curative measures,

the "jury's verdicts for counts one and two could have been non-unanimous," and he is therefore entitled to relief. We agree. …

The trial court overruled his objection and instructed the jury it could find Paredes–Solano guilty if it found he had "knowingly photograph [ed] or develop[ed] any visual depiction in which minors are engaged in exploitive exhibition or other sexual conduct or transport[ed] or possess [ed] any visual depiction in which minors are engaged in exploitive exhibition or other sexual conduct." During closing arguments, the prosecutor told the jury:

> [W]hen you go back to the jury deliberation room, you all don't have to agree on which of the four [acts] it is. Six of you could say he took those pictures. Four of you could say he possessed that film. Two of you could say he had that film developed. Just as long as you all find one, you don't have to agree on which one.

Thus, far from being cured, the error was exacerbated during jury instructions and the state's closing argument.

…

Moreover, during trial, Paredes–Solano presented multiple defenses to the various acts with which he was charged. **He defended against the photographing allegation by arguing "that somebody other than ... Paredes[-Solano] had access to th[e] camera ... because we have pictures of [him] that he obviously didn't take himself." And, although he admitted taking the film to Walgreens to be developed, he claimed he did not know he was transporting, developing, or possessing sexually exploitive photographs:**

> When [Paredes–Solano] dropped off those pictures, he had to knowingly possess what was in those pictures.... Would he take pictures to a Walgreens to get developed knowing that kind of stuff was in there? ... [When he dropped it off h]e said that the film is for his mother. And you remember, there were two rolls of film, and one of the rolls may very well have been for his mother.

The date stamp on the photographs indicated they had been taken on February 12, 2007. Paredes–Solano took them to be developed on February 23, and he returned to pick them up on February 26. **Thus, some members of the jury may have believed Paredes–Solano took the photographs, whereas others may have believed someone else took them but that Paredes–Solano knew what was depicted on the film when he took it to be developed.** Given the different dates on which the various acts occurred and Paredes–Solano's separate defenses to them, we cannot say the basis of the jury's verdicts was clear.

> … Paredes–Solano was deprived of his right to a unanimous jury verdict on the counts of the indictment charging sexual exploitation of a minor, and the error, therefore, was both fundamental and prejudicial.

State v. Paredes-Solano, 223 Ariz. 284, 290-91, ¶¶ 16-18, 20-22, 222 P.3d 900, 906-07 (App.2009) (emphasis added).

Given this uncertainty, the best course is to charge each act described in Section 13-3553(A)(1) and (A)(2) separately, even when they are listed in the same subsection. The worst that will happen is that the court will find the indictment multiplicitous, vacate the excess counts, but let one conviction and sentence stand. If, however, the State improperly alleges multiple acts within a single duplicitous count, the sole conviction will be vacated, and a retrial will be necessary.

III. Recommendations re: the prescribed remedies.

1. As noted in the first section of this outline, courts forbid duplicitous indictments and charges to avoid three different potential problems: (a) the defendant's inability to interpose a double-jeopardy defense in subsequent proceedings; (b) the danger that the jury might not unanimously agree upon the same act when finding the defendant guilty; and (c) the defendant did not receive adequate notice of the charge for which he would ultimately stand trial, as the Sixth Amendment to the United States Constitution requires.

2. Furthermore, courts have recognized that a duplicitous indictment or charge may be cured by the following remedial measures:

(a) The court may give an instruction and a special verdict form requiring the jury to unanimously agree on at least one of the specific acts that the trial evidence shows the defendant committed.

(b) The court may require the prosecution to elect which act constitutes the basis for the charged offense.

(c) The State identified which specific act is the basis for the charged offense during its opening statement and closing arguments.

3. Prosecutors confronting duplicity errors in both forms should be familiar with whether and how the remedial measures listed above—as well as others detailed below—cure these three potential grounds for reversible error. The goals of such inquiries include being able to recognize: (a) which remedy is most efficacious in defusing the concerns that could trigger reversal; and (b) when resort to a particular remedy in certain situations could inadvertently create a NEW ground for reversal.

Pretrial Notice

1. The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right … to be informed of the nature and cause of the accusation."

2. "For Sixth Amendment purposes, when a defendant does not receive constitutionally adequate notice of the charges against him, he is necessarily and actually prejudiced." *State v. Freeney*, 223 Ariz.110, 114, ¶ 26, 219 P.3d 1039, 1043 (2009) (citing *Sheppard v. Rees*, 909 F.2d 1234, 1237 (9th Cir. 1989), for the proposition that "[a] trial cannot be fair unless the nature of the charges against a defendant are adequately made known to him or her in a timely fashion."). *Accord Hunter v. New Mexico*, 916 F.2d 595, 598-99 (10th Cir. 1990) ("Every accused has the right to be informed of the nature and cause of the accusations filed against him. … A fatal variance denies a defendant this fundamental guarantee because it destroys his right to be on notice of the charge brought in the indictment.") (citing U.S. Const. amend VI; *Government of Virgin Islands v. Joseph*, 765 F.2d 394, 397 (3rd Cir. 1985)).

3. Because the three remedies listed above—jury instructions and verdict forms requiring jury unanimity, prosecutorial election of the basis of the charge, and closing arguments—cannot be employed until trial itself, they obviously lack any ability to cure the absence of constitutionally adequate pretrial notice to the defendant. As shall be explained below, prosecutors have other tools available to demonstrate that the defendant did not suffer a violation of his Sixth Amendment right to notice.

4. Defendants complaining about duplicitous *indictments* will face an uphill battle in prevailing on their claims of inadequate pretrial notice because the plain text of the count at issue actually describes the multiple acts underlying that charge. *See State v. Butler*, 230 Ariz. 465, 470, ¶ 14, 286 P.3d 1174, 1179 (App.2012) ("The defect marking a duplicitous indictment is, by definition, apparent from its text, meaning it might not deprive a defendant of the 'fundamental right to reasonable notice of the criminal acts charged against him,' [citation omitted] in the same manner as a duplicitous charge.") (quoting *Spencer v. Coconino County Superior Court, Div. 3*, 136 Ariz. 608, 610, 667 P.2d 1323, 1325 (1983)). The fact that a single count describes more than one criminal act is the reason why Arizona's procedural rules and precedent require defendants to raise challenges to duplicitous indictments within 20 days of trial or find them forfeited on appeal.

5. Unlike duplicitous indictments, duplicitous *charges* are not apparent from the text of the count at issue, but instead come into existence during trial, when the State seeks to prove the defendant's guilt on a single count by offering evidence that the defendant engaged in the prohibited conduct on multiple occasions. In such duplicitous-charge scenarios, prosecutors should recall the maxim, "for Sixth Amendment purposes, courts look beyond the indictment to determine whether defendants received actual notice of charges, and the notice requirement can be satisfied even when a charge was not included in the indictment." *State v. Freeney*, 223 Ariz. 110, 114, ¶ 29, 219 P.3d 1039, 1043 (2009).

Accord Hartman v. Lee, 283 F.3d 190, 195 (4th Cir. 2002) (noting that the Supreme Court has *never* held that "the only constitutionally sufficient means of providing the notice required by the Sixth and Fourteenth Amendments is through the charging document") (collecting cases); *United States v. Odom*, 252 F.3d 1289, 1298 (11th Cir. 2001) ("Even an inadequate indictment satisfies due process if the defendant has actual notice, so that she suffers no prejudice."); *Morrison v. Estelle*, 981 F.2d 425, 427 (9th Cir. 1992) (recognizing that "constitutionally adequate notice of a felony-murder charge could be provided to a defendant by means other than the charging document"); *Hulstine v. Morris*, 819 F.2d 861, 864 (8th Cir. 1987) ("Due Process requirements may be satisfied if a defendant receives *actual* notice of the charges against him, even if the indictment or information is deficient.") (emphasis in original); *Wilkerson v. Wyrick*, 806 F.2d 161, 164 (8th Cir. 1986) ("Wilkerson argues that we are confined to the four corners of the charging papers in deciding whether he had sufficient notice that an instruction on second degree murder would be submissible in this case. ... We disagree that our examination is limited to the charging papers."); *State v. Glass*, 136 S.W.3d 496, 513 (Mo.2004) ("Even legally insufficient charging documents have been held not to violate the Sixth Amendment when the defendant received actual notice of the charge against him."); *Parker v. State*, 917 P.2d 980, 986 (Okla.Crim.App.1996) (reversing its prior holding that notice inquiry would be limited to four corners of charging document).

> **(A) Besides the allegations made in the charging document, the State may satisfy the Sixth Amendment's notice requirement through its sentencing-enhancement allegations, its pretrial disclosure to the defendant, and its pretrial pleadings.** *See State v. Freeney*, 223 Ariz. 110, 114, ¶ 27, 219 P.3d 1039, 1043 (2009) ("Freeney had notice that the State was alleging and intending to prove that the victim had suffered serious physical injury. This notice came from various pretrial disclosures, including photographs, medical records, and the State's expressed intent to call the treating physician as a witness; the allegation of dangerousness, which cited serious physical injury to the victim; and the parties' joint pretrial statement in which the State alleged Freeney had beaten the victim and caused severe injuries. In fact, when the State moved to amend the indictment, Freeney acknowledged he had notice of the victim's injuries."). *Cf. State v. Delgado*, 174 Ariz. 252, 225, 848 P.2d 337, 340 (App.1993) ("Because of extensive discovery, defendant had adequate notice of the act with which he was charged and had an opportunity to prepare and defend against it."); *State v. Schroeder*, 167 Ariz. 47, 52, 804 P.2d 776, 781 (App.1990) ("Furthermore, defendant had undertaken discovery and he was not in doubt as to the specifics of the acts as to which the indictment related.").
>
> **1. Applying this principle to sex-crime cases, the State might be able to prove that the defendant had adequate pretrial notice that multiple acts constituted the basis for a single charge by, *inter alia*:** (a) advising the trial court that the defendant received a copy of the victim's videotaped interview statements, which reported sexual abuse on occasions other than those incidents charged in the indictment; (b) referencing every episode of sexual abuse the defendant committed while responding to his

motion for release or in a joint pretrial statement; (c) warning the defendant during a settlement conference that evidence of multiple acts would be offered at his trial; or (d) producing transcripts of defense pretrial interview of State's witnesses who related the defendant's commission of multiple acts against the charged victim(s).

2. These countermeasures will fail, however, if: (1) the State notified the defendant before trial that act A constitutes the basis for the charged offense, and that it will offer acts B and C under Rule 404(b) or 404(c); and (2) during trial, the State switches gears, abandons act A as the charged offense, and seeks the defendant's conviction on act B or act C. In such cases, the courts will conclude that the defendant detrimentally relied upon the prosecution's pretrial representations and consequently reverse the conviction because the defendant was misled about which act was the charged offense. *See State v. Johnson*, 198 Ariz. 245, 248, ¶ 9, 8 P.3d 1159, 1162 (App.2000) (holding that the defendant lacked adequate notice of the charged offense because the State had moved to amend the indictment before trial—the consequence of which was that the defendant had no reason to expect that the State would attempt to convict him at trial on the charge originally alleged, but subsequently abandoned).

(B) To buttress its conclusion that the State may satisfy the Sixth Amendment's notice-of-the-charge requirement through its *pretrial* disclosure and pleadings, the Arizona Supreme Court cited precedent recognizing that the State may constitutionally provide the defendant with notice during trial itself. *See State v. Freeney*, 223 Ariz. 110, 115, ¶ 29, 219 P.3d 1039, 1044 (2009) (citing *Stephens v. Borg*, 59 F.3d 932, 934-36 (9th Cir. 1995), which held that the first-degree murder indictment's failure to charge felony-murder did not violate the Constitution where the defendant "had five days of actual notice of the prosecution's intent to rely on a felony-murder theory" prior to closing argument). *Accord Murtishaw v. Woodford*, 255 F.3d 926, 953-54 (9th Cir. 2002) (holding that defendant received adequate notice during trial because prosecution advanced new theory of guilt during its opening statement, presentation of evidence, and jury-instruction conference, all of which occurred before closing arguments); *Calderon v. Prunty*, 59 F.3d 1005, 1009-10 (9th Cir. 1995) (distinguishing ambush situation in Sheppard by noting that prosecution advanced "lying-in-wait" theory during opening statement, the presentation of evidence, and trial court's description of crime scene during hearing on motion for directed verdict, all of which occurred before defendant testified); *Morrison v. Estelle*, 981 F.2d 425, 428 (9th Cir. 1992) ("At Morrison's trial, the prosecutor requested felony-murder instructions at the initial instructions conference and Morrison's counsel had 2 days in which to prepare a closing argument. No ambush occurred at Morrison's trial.").

(C) Generally speaking, defendants who present all-or-nothing defenses, such as denying the commission of any sexual act and/or challenging the victim's credibility, fail to demonstrate actual prejudice. *See State v. Freeney*, 223 Ariz. 110, 115, ¶ 28, 219 P.3d 1039, 1044 (2009) (holding that the defendant suffered no prejudice from the trial court's erroneous morning-of-trial amendment of indictment to reflect the commission of aggravated assault under a new theory non-prejudicial error, partly because "his 'all or nothing' defense, based on his assertion that someone other than he was the perpetrator, did not change as a result of the amended charge."); *State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989) (duplicitous indictment that charged defendant with one count of aggravated assault for chasing two victims with his truck did not deny him an "essential right to his defense" because his defense was denial that offenses had occurred); *State v. Ramsey*, 211 Ariz. 529, 533, ¶ 7, 124 P.3d 756, 760 (App.2005) ("Ramsey's global defense, however, was that his wife had set him up out of revenge and that he had not, and could not have, committed any of the alleged sexual acts against A."); *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App.1996) ("Any defect in the dates alleged in the indictment ... could not have prejudiced [the defendant's] defense" when "his sole defense was that [the victim] was lying"); *State v. Schroeder*, 167 Ariz. 47, 53, 804 P.2d 776, 782 (App.1990) (defendant charged with a single count of sexual abuse was not prejudiced by the victim's testimony to seven separate acts because his "only defense was that the acts did not occur," which left "the jury was … with only one issue—who was the more credible of the only two witnesses to the alleged acts?").

(D) Beware: courts will nonetheless reverse a conviction if the defendant's ability to present a defense was *actually prejudiced* by the State's switching the basis for the charge. *Compare State v. Freeney*, 223 Ariz. 110, 115, ¶ 28, 219 P.3d 1039, 1044 (2009) ("Unlike the situation in *Sanders*, Freeney has never suggested that the amendment affected, let alone prejudiced, his litigation strategy, trial preparation, examination of witnesses, or argument; nor did he request a trial continuance or recess."); *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980) ("Defendant contends that his ability to prepare his case for trial was impaired by one of the amendments, because his lack of prior knowledge of the date change prevented him from using certain conflicts that arose in trial testimony. Examination of the record reveals, however, that defense counsel had notice of the discrepancies in the dates well before trial. We, therefore, reject this allegation of prejudice."); *and State v. Fimbres*, 222 Ariz. 293, 304, ¶¶ 40-41, 213 P.3d 1020, 1031 (App.2009) (amendment to indictment that changed the nature of the offense charged from credit-card forgery, in violation of A.R.S. § 13-2104(A)(2), to altering or manufacturing a credit card, in violation of A.R.S. § 13-2104(A)(1), was not prejudicial, partly because the defendant "admitted at trial that he had made the purchases alleged with the altered cards and only denied having the intent to defraud—a required element under either subsection of § 13-2104(A)"); *with State v. Blakley*, 204 Ariz. 429,

438-41, ¶¶ 42-58, 65 P.3d 77, 86-89 (2003) (the addition of child abuse as a new predicate felony after both parties had rested in a first-degree murder, and the defendant had premised his entire defense on the indictment's sole designated predicate felony, sexual assault); *State v. Johnson*, 198 Ariz. 245, 248-49, ¶¶ 7-12, 8 P.3d 1159, 1162-63 (App.2000) (holding that the trial court improperly granted the prosecution's motion to amend the indictment, urged at the close of its case, where the victim testified that defendant had vaginal intercourse with his penis, but the indictment alleged that defendant digitally penetrated her vagina, and the victim testified that defendant caused her to touch his penis with her mouth, but the indictment alleged that she had manual contact; this error was prejudicial, despite the defendant's universal defense denying any sexual acts with victim, because the amendment's timing "seriously undercut [defendant's] opportunity to attack the victim's inconsistent statements ... and inhibited his right to defend himself against her accusations").

(E) Defendants will sometimes raise duplicitous-charge claims on appeal based upon the following coincidences: (1) the trial evidence showed that the defendant committed the same type of sexual misconduct against the victim on multiple occasions—some charged and others offered under Rule 404(b) or Rule 404(c); (2) the trial court's jury instructions did not identify which acts constituted the basis for the charge, and which constituted other-act evidence; and (3) the court did not give the jury special verdict forms or an instruction requiring unanimity regarding the act underlying their verdicts. *See State v. Sanchez,* 2011 WL 283313 (Jan. 27. 2011) (unreported decision where defendant raised a duplicitous-charge argument where the State offered other-act evidence involving the same two victims pursuant to Rule 404(c), but affirming the conviction because the prosecutor identified the charged incidents during closing argument, the charged and uncharged incidents involved different kinds of sexual activities, and the defendant's trial defense applied equally to the charged and uncharged acts).

This situation has arisen in *State v. David W. Curtis*, 1 CA–CR 11-0387, a case in which the defendant was convicted on 15 counts of sexual exploitation of a minor for possessing child pornography on various computer storage devices and four counts of molesting the same child, whom he photographed during sex acts. To rebut the defendant's theory that a private party was responsible for the contraband images found on his USB device, the State offered evidence that duplicates of the charged images were found on computers and other storage media found inside the defendant's home and car. The State also offered in evidence uncharged images of the defendant molesting the victim to rebut the defendant's misidentification and lack-of-sexual-motivation defenses. However, the final jury instructions neither specified the images that constituted other-act evidence, nor included a unanimity instruction. The defendant is arguing on this pending appeal that: (1) the jury could have found him guilty of possessing visual depictions of child pornography without unanimously agreeing upon which

computer device contained the image at issue; and (2) the jurors might not have unanimously agreed upon the act underlying each of his four child-molestation convictions because the State admitted more than four photographs of the defendant having sexual contact with the victim (his baby granddaughter).

Recommendation: This type of situation can be avoided by: (1) asking the court to give the jury a limiting instruction immediately after the introduction of the other-act evidence during trial; (2) requesting special verdict forms that specify the basis for each charged offense (sex acts by type, date, and location; child porn by the visual depiction's file name, its digital storage medium, and folder); (3) submitting a proposed jury instruction that comprehensively identifies the acts/images that were offered pursuant to Rule 404(b) and Rule 404(c); and (4) closing remarks that delineate the acts that constitute the basis for the charged offenses, identify the acts that were offered under Rule 404(b) and/or Rule 404(c), and remind the jury that they must base their verdicts on the *charged* acts.

6. Summary and Recommendations.

A. Lack of notice claims will not pose any problem in cases involving duplicitous *indictments* because the text of the count at issue, by definition, describes the entire universe of acts that could potentially constitute the basis for conviction.

B. In cases involving duplicitous *charges*, the prosecutor should be prepared to demonstrate that the defendant had pretrial notice of the alternative bases for conviction on a single charge by means other than the indictment. Reproduction of the police reports and other discovery materials for inclusion in the record on appeal is especially appropriate when defense counsel disputes pretrial notice. Prosecutors generally stand on solid ground when the defendant's defense theory applies to each and every act constituting the potential basis for conviction, except in those cases in which the defendant demonstrates how the untimely presentation of new acts impeded his ability to defend against them.

3. If the defendant encountering a duplicitous charge legitimately shows that he was surprised by the presentation of evidence of certain acts and therefore cannot rebut the State's evidence regarding his misconduct on these occasions, the prosecutor can minimize the likelihood of reversal on appeal by several means:

(a) electing for submission to the jury the criminal act of which the defendant had adequate notice;

(b) declining the trial court's offer to submit interrogatories or special-verdict forms requiring jury findings on those acts against which the defendant could *not* properly defend because of deficient notice;

(c) explicitly urging the jury during closing argument to base their verdict solely upon the act of which the defendant had adequate notice, and *not* to convict the defendant for those act(s) for which he lacked sufficient notice;

(d) agreeing to an instruction requiring the jury to disregard the testimony regarding the problematic acts and the striking of such testimony from the record; and/or

(e) requesting a limiting instruction designating the conduct that poses notice-of-charge problems as other-act evidence (a remedial measure that you should invoke only when the defendant was aware that the State intended to present evidence that he committed these acts, but was unaware that they might be submitted to the jury as a charged offense, as in *State v. Johnson*, 198 Ariz. 245 (App.2000)).

Double Jeopardy

1. Jeopardy attaches during jury trials when the court impanels the venire. ***See Crist v. Bretz*****, 437 U.S. 28, 37-38 (1978);** ***State v. Aguilar*****, 217 Ariz. 235, 238, ¶ 8, 172 P.3d 423, 426 (App.2007). During bench trials, jeopardy attaches when the State's first witness is sworn.** ***See Serfass v. United States*****, 420 U.S. 377, 388 (1975);** ***State v. Elias*****, 111 Ariz. 195, 196, 526 P.2d 734, 735 (1974).** After either triggering event, the Double Jeopardy Clause will prevent the State from subjecting the defendant to a successive prosecution for any of the criminal acts described in the same count of a duplicitous indictment.

2. Defendants interposing a double-jeopardy defense during subsequent proceedings are not limited to the four corners of the prior case's indictment, but instead may consult the prior proceeding's entire record. *See State v. Lombardo*, 104 Ariz. 598, 599, 457 P.2d 275, 276 (1969) ("That information was fully developed at trial, and the record will be available to Lombardo as a bar to any subsequent action which might be filed against him for the same offense."); *State v. Schneider*, 148 Ariz. 441, 446, 715 P.2d 297, 302 (App.1985) ("In discussing the double jeopardy issue [presented by Arizona Rule of Criminal Procedure 13.5(b)'s automatic amendment of the indictment to conform to the evidence], the court pointed out that the defense was not limited to the four corners of the indictment, and the entire record was available to bar a subsequent prosecution."); *State v. Barber*, 133 Ariz. 572, 577-78, 653 P.2d 29, 34-35 (App.1982) ("The amendments granted did not limit the appellant's defense of double jeopardy for the entire record of the case would be available to bar a subsequent prosecution for any possible charges pertaining to a Walter Cox loan. A double jeopardy defense is not limited to the four corners of the indictment."); *State v. Phelps*, 125 Ariz. 114, 119, 608 P.2d 51, 56 (App.1981) ("Insofar as the defense of double jeopardy is concerned, this defense is not limited

to the four corners of the indictment ... and the entire record is available to bar any subsequent action."); *State v. Mallory*, 19 Ariz.App. 15, 21, 504 P.2d 556, 562 (1972) ("In this case the facts developed at the preliminary hearing are sufficient in and of themselves to form the basis of a double jeopardy plea.").

3. Courts may eradicate the possibility that a duplicitous indictment or duplicitous charge will violate the double-jeopardy prohibition during a successive prosecution by employing one of the following two procedural vehicles: (a) giving the jury a single verdict form with an interrogatory requiring a guilty or not-guilty finding per alternative criminal act offered to prove a single count; and (b) submitting a separate verdict form for each alternative act. Because both options require the jury to make explicit findings on *all* of the alternative bases for finding the defendant guilty on a certain count, the defendant, the State, and the judiciary will **need go no further than the verdict forms** to determine whether the Double Jeopardy Clause bars a subsequent prosecution.

4. The remedy of requiring the State to elect the act constituting the charged offense.

A. The remedy of forcing the State to elect the particular act that it will submit to the jury for a verdict empowers the defendant to interpose a double-jeopardy defense as to the *selected* alternative, regardless of whether the problem is a duplicitous indictment or a duplicitous charge.

B. As for the act that the prosecution did *not* elect to present to the jury, this remedy is adequate in the duplicitous-indictment scenario (i.e., when the text of the indictment references all of the alternative ways the defendant could have committed the alleged offense), because jeopardy attached on the non-selected act either when the court impaneled the jury, or when the State's first witness was sworn during a bench trial.

C. The efficacy of the prosecutorial-election remedy in resolving double-jeopardy issues is less clear in the context of duplicitous *charges*, which arise when each count of the indictment appears to allege the commission of just one act, but the State offers evidence of multiple acts at trial to prove that count. On one hand, the argument can be reasonably made that the acts the prosecutor did not elect to submit to the jury for a verdict are not subject to the double-jeopardy-bar because they constituted other-act evidence, the admission of which must be justified pursuant to the intrinsic-evidence doctrine, Rule 404(b), or Rule 404(c). The contrary view can be gleaned from *Schroeder*, where the Arizona Court of Appeals indicated—albeit without explication and while confronting an indictment that apparently referenced seven different acts of fondling within one sexual-abuse count—that double jeopardy would preclude the State in a duplicitous-charge situation from later trying the defendant for any of the seven acts of sexual abuse that the State had the victim mention during trial on a single sexual-abuse count:

> Double jeopardy will bar a second prosecution if the evidence necessary to support a second conviction was admissible and would have supported a conviction in the first prosecution. *United States v. Marable*, 578 F.2d 151, 153 (5th Cir. 1978). *Here the specific acts summarized in the indictment were introduced into evidence at trial. Defendant, therefore, can never again be prosecuted for any of these incidents*. [*United States v.*] *Robin*, 693 F.2d [376,] 378 [(5th Cir. 1982)]. Thus, defendant has not been prejudiced on double jeopardy grounds.

State v. Schroeder, 167 Ariz. 47, 52, 804 P.2d 776, 781 (App.1990) (emphasis added). *See also Robin*, 693 F.2d at 378 ("Because the specific threats summarized in the indictment were introduced into evidence, none could be used as the basis of a future indictment.") (dealing with an indictment that listed within one count several verbal threats against President Reagan).

D. The State needs to be mindful that, as explained above, the defendant might characterize on appeal the alternative acts the prosecutor did *not* elect as the basis for the charged offense as other-act evidence requiring Rule 404(c) screening or a limiting instruction. The State could guard against this potential scenario by, *inter alia*: (1) articulating a non-propensity purpose for presenting evidence of the unelected act(s) during closing argument; (2) ensuring that the court follows the procedural prerequisites for admitting the unelected conduct under Rule 404(b) and/or Rule 404(c); and (3) requesting a limiting instruction to ensure the jury uses the evidence for a proper purpose.

> **N.B. The outline on other-act evidence that was prepared for this 2014 seminar recites many common rationales for admitting uncharged-act evidence under Rule 404(B) in sex-crime prosecutions and sets forth the procedural requirements for admitting evidence under Rule 404(b), Rule 404(c), and the intrinsic-evidence doctrine. Additionally, note the availability of the "complete-the-story" rationale for justifying the admission of the criminal act the State elected *not* to present to the jury, particularly when the elected and non-elected acts, as in *Klokic*, were committed mere moments apart.** *See United States v. Powers*, 59 F.3d 1460, 1466 (4th Cir. 1995) ("[A]dmission of bad acts evidence is necessary to show the context of the crime when the bad acts are 'so intimately connected with and explanatory of the crime charged against the defendant and [are] so much a part of the setting of the case and its environment that [their] proof is appropriate in order to complete the story of the crime on trial by proving the immediate context of the res gestae.'") (quoting *United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980) (collecting federal cases); *State v. Cook*, 150 Ariz. 470, 472, 724 P.2d 556, 558 (1986) ("However, Arizona has long recognized an exception to the rule: evidence of circumstances which complete the story of the crime is admissible, even though it may reveal that other criminal offenses have been committed.") (collecting cases); *State v. Chaney*, 141 Ariz. 295, 309-10, 686 P.2d 1265, 1279-80 (1984) (**"**In this

case, Chaney put a gun to the first deputy's head as soon as he was able. The jury was entitled to know under what conditions Chaney was operating. The vehicle Chaney drove was stolen, as were most, if not all, of the items he had at the campsite. With this knowledge the events that happened become more comprehensible to the jury. We find no abuse of discretion."); *State v. Villavicencio*, 95 Ariz. 199, 200, 388 P.2d 245, 246 (1964) ("Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime."); *State v. Lamar*, 144 Ariz. 490, 494-95, 698 P.2d 735, 741-42 (App.1984) ("However, evidence of prior bad acts, another offense or misconduct, is admissible to show the complete story even though other prejudicial facts are revealed thereby. … This evidence was admissible to show why the school officials acted as they did in regard to Hayes. It explains why he was expelled and why Mr. Bergman reported the incident to the police and requested that Hayes be arrested if he came back on campus.") (citing *State v. Johnson*, 121 Ariz. 545, 592 P.2d 379 (1979)).

E. Another caveat in duplicitous-*charge* situations: If the grand jury testimony relates the defendant's commission of a specific act on a particular occasion, resist the temptation to shift horses midstream and substitute the original basis of the charged offense with a new event/act that the victim related at trial. Electing an incident that differs from the one specifically described to the grand jury could lead to reversal. *See De Jonge v. Oregon*, 299 U.S. 353, 362 (1937) ("Conviction upon a charge not made would be sheer denial of due process."); *State v. Martin*, 139 Ariz. 466, 472, 679 P.2d 489, 495 (1984) ("The indictment clearly charges both Martin and Phelps with the sale of cocaine to an unnamed buyer. The problem arose at the close of evidence, when the indictment was interpreted by the prosecution and the trial court to allow the argument that the defendant could be convicted for sale of cocaine to Phelps. This allowed the prosecutor to argue to the jury that a verdict of guilty could be returned even if that verdict were based on a transaction with which the defendant had not been charged."); *State v. Johnson*, 198 Ariz. 245, 248, ¶ 11, 8 P.3d 1159, 1162 (App.2000) ("Because the acts described in her testimony differed from the acts alleged in the information, Johnson did not have an ample opportunity to defend against the amended count.") (vacating convictions for sexual conduct with a minor and child molestation when the trial testimony showed entirely different kinds of sexual acts than those specified in the charging document); *State v. Mikels*, 119 Ariz. 561, 562-63, 582 P.2d 651, 652-53 (App.1978) (whereas the grand-jury transcript revealed that indictment had been returned for a sodomy offense that occurred in a jail shower, the State improperly procured the defendant's conviction based upon a different act of sodomy that he committed against the same victim 12 days later in a jail cell bunk).

The Arizona Supreme Court's recent decision affirming the conviction in *State v. Freeney*, 223 Ariz. 110, 219 P.3d 1039 (2009), seems to conflict with the aforementioned precedent deeming substantial variances between the indictment and the evidence offered at trial to be reversible error, at least in those cases wherein the

defendant had actual notice of the new charge. The Arizona Supreme Court first held that the trial court improperly allowed the State to alter the nature of the aggravated-assault charge by granting its motion to amend the indictment, pursuant to Arizona Rule of Criminal Procedure 13.5(b). *Id.* at 113-14, ¶¶ 15-20, 219 P.3d at1042-43. *Accord State v. Sustaita*, 119 Ariz. 583, 591, 583 P.2d 239, 247 (1978) ("We have stated that '[a]n offense which requires different evidence or elements than the principal charge is a separate offense ....' ") (quoting *State v. Woody*, 108 Ariz. 284, 287, 496 P.2d 584, 587 (1972)). The Arizona Supreme Court nonetheless found the failure to present the new criminal charge to the grand jury to be harmless error:

> An amended indictment that changes the nature of the offense by alleging new or different elements raises another constitutional issue: failure "to ensure that a neutral intermediary—a grand jury comprised of ordinary citizens—finds that probable cause exists before the State can bring charges." *McKaney v. Foreman*, 209 Ariz. 268, 274-75 ¶ 31, 100 P.3d 18, 24-25 (2004) (Hurwitz, J., dissenting in part and concurring in part); *see also* Ariz. Const. art. 2, § 30 ("No person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment."). Thus, the analysis and result might well differ when such issues are raised in a pretrial petition for special action relief. Here, however, "any failure to have submitted an element to the grand jury for a finding of probable cause is perforce harmless error" because the jury found Freeney guilty beyond a reasonable doubt. *McKaney*, 209 Ariz. at 275 ¶ 33, 100 P.3d at 25 (Hurwitz, J., dissenting in part and concurring in part) (citing *United States v. Mechanik*, 475 U.S. 66, 73 [ ] (1986)).

State v. Freeney, 223 Ariz. 110, 115, ¶ 30 n.4, 219 P.3d 1039, 1044 n.4 (2009).

5. The remaining two remedies—a general instruction requiring the jurors to unanimously agree on the act constituting the basis for their verdict and the closing arguments of the parties—also enable the defendant to raise a double-jeopardy defense to a subsequent prosecution. However, these remedies require the parties to consult the prior case's entire record and therefore lack the definitive clarity provided by the verdict-form and prosecutorial-election measures.

Jury Unanimity

1. The best method of ensuring juror unanimity in cases involving duplicitous charges or duplicitous indictments is submitting interrogatories or special verdict forms requiring the jury to make guilt/innocence determinations on each and every act constituting a potential basis for finding the defendant guilty on a certain count.

2. The alternative remedy of requiring the prosecution to elect the specific act the jury will consider also effectively guarantees that any guilty verdict will be based upon unanimous agreement that the defendant committed the same criminal act.

3. Sometimes trial judges instruct the jurors not to find the defendant guilty unless they unanimously agree that the State proved the defendant's commission of the same act beyond a reasonable doubt. In such cases, the State on appeal may invoke precedent holding that jurors are presumed to follow the court's instructions. *See State v. Prince*, 226 Ariz. 516, 537, ¶ 80, 250 P.3d 1145, 1166 (2011); *State v. Newell*, 212 Ariz. 389, 403, ¶¶ 68-69, 132 P.3d 833, 847 (2006); *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996).

4. Closing arguments by the prosecution and defense counsel identifying the basis for each count will help the Attorney General's Office argue on appeal that the jurors based each guilty verdict on unanimous agreement that the defendant committed the same particular act. Such closing remarks are especially appropriate when the judge gives a unanimity instruction, but NO special verdict forms.

A. In other contexts, Arizona courts have considered the closing arguments of the parties while resolving challenges to allegedly defective jury instructions. *See State v. Valverde*, 220 Ariz. 582, 586, ¶ 16, 208 P.3d 233, 237 (2009) ("In assessing the impact of an erroneous instruction, we also consider the attorneys' statements to the jury.") (defense counsel's arguments that the State could not negate his claim of self-defense cured the prejudice from the absence of an instruction allocating the burden of proof for self-defense); *State v. Milke*, 177 Ariz. 118, 123, 865 P.2d 779, 784 (1993) (counsel's closing arguments "eliminated the possibility ... that the jury might be misled into thinking that motive or lack of motive is insignificant"); *State v. Fierro*, 220 Ariz. 337, 340, ¶ 14, 206 P.3d 786, 789 (App.2008) ("Furthermore, even assuming any ambiguity in the instruction, it was mitigated during closing arguments [by the prosecutor and defense counsel that the State needed to prove that the defendant knew the marijuana he was transporting was 'for sale'].") *State v. Johnson*, 205 Ariz. 413, 417, ¶ 11, 72 P.3d 343, 347 (App. 2003) (an appellate court will consider jury instructions "in context and in conjunction with the closing arguments of counsel"); *State v. Morales*, 198 Ariz. 372, 374, ¶ 5, 10 P.3d 630, 632 (App.2000) ("In addition, any alleged ambiguity in the instruction was alleviated by the prosecutor's closing argument, which made clear that the jury had to find that Morales was 'impaired to the slightest degree by alcohol.'") (citing *State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App.1989)); *State v. Cruz*, 189 Ariz. 29, 35, 938 P.2d 78, 84 (App.1996) (alternatively holding that closing arguments remedied the omission of any standard for determining when the trial evidence raises the issue of self-defense).

B. As indicated above, prosecutorial closing remarks identifying the precise act underlying the charged offense might prove alone be sufficient to safeguard the defendant's right to a unanimous verdict. *See United States v. Miller*, 520 F.3d 504, 513-14 (5th Cir. 2008) (prosecution's closing remarks cured allegedly duplicitous tax-evasion charge by identifying the specific transaction underlying the indicted offense); *State v. Hamilton*, 177 Ariz. 403, 410, 868 P.2d 986, 993 (App.1993) ("The victims testified as to the specific occurrence that formed the basis for each specific count, and the state clearly delineated during closing arguments what specific conduct constituted the offense charged in each specific count."); *State v. Molen*, 231 P.3d 1047 (Idaho App.

2010) (rejecting challenge to absence of a special unanimity instruction in a case where the defendant was charged with one act of genital-to-genital contact with a child, but evidence of more than one act was presented, because the prosecutor elected the charged incident during opening statement and closing arguments, as well as the State's trial evidence); *State v. Fulton*, 23 P.3d 167, 173 (Kan.App.2001) (prosecutor effectively elected which act constituted basis for aggravated assault charge by identifying the cutting of the victim's face and chest instead of blows inflicted during pistol-whipping); *State v. Thompson*, 290 P.3d 996, 1017-18, ¶¶ 89-90 (Wash.App.2012) (holding that the prosecutor elected during closing argument which act constituted the basis for sexual-motivation allegation underlying burglary, unlawful imprisonment, and assault charges).

C. Recommendation: Despite the precedent cited in subparagraph 4B, the best practice is to employ the other remedial measures *in conjunction with* your delineation of the charged and uncharged acts during opening statements and closing arguments. If the court refuses to utilize any of the remedial tools at its disposal, your closing remarks will need to be very precise in identifying which acts constitute the basis for the charges, naming the acts that were offered as other-act evidence, and reinforcing the requirement that the jury needs to find the *same* charged act beyond a reasonable doubt.